

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK RENARD SPENCER,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 252594

Wayne Circuit Court

LC No. 03-008002-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of assault with intent to do great bodily harm, MCL 750.84, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant, in addition to the mandatory two-year felony-firearm sentence, to concurrent terms of thirty months to ten years' imprisonment for the assault conviction and six months to five years' imprisonment for possessing a firearm as a felon. We affirm but remand for correction of defendant's sentencing information report.

I. Sufficiency of the Evidence

Defendant first asserts that the prosecution presented insufficient evidence support his convictions. Despite defendant's statement of the question presented, defendant offers no argument concerning the sufficiency of the evidence of his assault and felony-firearm convictions. Therefore, defendant has abandoned any challenge in regard to these convictions because he has failed to properly address the merits of these issues. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Regarding his conviction of possessing a firearm as a felon, defendant merely contends that the felony on which his conviction was predicated does not meet the definition of a "specified felony" in MCL 750.224f. However, in finding defendant guilty of having violated MCL 750.224f, the trial court relied on defense counsel's stipulation that defendant had been convicted of a "specified felony" and was ineligible to possess a firearm at the time in question. Consequently, defendant has waived any challenge in this regard. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); see also *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

II. Sentencing Guidelines Scoring

Defendant also challenges the trial court's scoring of Offense Variables (OV) 12 and 13 in sentencing defendant for the assault. Although defendant did not preserve this issue by challenging the scoring below, MCL 769.34(10); MCR 6.429(C), our Supreme Court has held that an unpreserved scoring issue may be reviewed on appeal for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004).

The trial court assessed twenty-five points for OV 12. MCL 777.42(1)(a) provides that twenty-five points are to be scored for this variable where "[t]hree or more contemporaneous felonious criminal acts involving a crime against a person were committed." Because there was no objection to the scoring, the record does not indicate the basis for this scoring decision. However, MCL 777.42(2)(a) provides that an act is contemporaneous if it occurred "within 24 hours of the sentencing offense" and "will not result in a separate conviction." Defendant's possession and use of a firearm during the assault were not contemporaneous under this definition because they resulted in separate convictions. (Further, MCL 777.42(b) expressly exempts a felony-firearm violation from consideration in scoring OV 12.) The record contains no other evidence of felonious criminal acts having been committed within twenty-four hours of the assault. Accordingly, we conclude that the trial court erred in scoring twenty-five points for OV 12.

Defendant also argues that the trial court erred in scoring twenty-five points for OV 13 because his convictions of felony-firearm and possessing a firearm as a felon are crimes against public safety rather than a person. MCL 777.43(1)(b) provides that twenty-five points are to be scored for this variable where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(2)(a) provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." The basis for the trial court's scoring of OV 13 is not apparent from the record. And, although required by MCR 7.212(C)(7), defendant has failed to provide this Court with a copy of the presentence investigation report, which would provide a history of defendant's criminal conduct, if any, during the five-year period relevant to the scoring of OV 13. Failure to provide this Court with the relevant record waives further review of this issue. MCL 769.34(8)(b); *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

Even with the correction of defendant's OV 12 score to zero, defendant's total OV score is sixty-five points, changing defendant's minimum sentence range from twenty-nine to fifty-seven months to nineteen to thirty-eight months. Because defendant's minimum sentence of thirty months is within this range, we affirm defendant's sentence, *People v Houston*, 261 Mich App 463, 472-473; 683 NW2d 192 (2004), but remand for correction of defendant's sentencing information report.

III. Ineffective Assistance of Counsel

Defendant also argues that his trial counsel rendered ineffective assistance because he (1) represented two defendants in a "two (2) defendant trial" and (2) failed to call witnesses requested by defendant.¹ Because defendant failed to file a motion for a new trial on these

¹ Although defendant asserts several other ways in which his counsel was ineffective, these issues are not raised or even implied in defendant's statement of questions presented. Therefore,
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grounds or request a *Ginther*² hearing, our review is limited to the mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness, and that this prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004).

Defendant first asserts that defense counsel was ineffective because he represented two defendants in a "two (2) defendant trial." But defendant has failed to properly present this issue on appeal. He states only that defense counsel represented both defendants and that defense counsel only called witnesses supplied by the codefendant, not defendant. Defendant has failed to explain how this fell below objective standards of reasonableness or how it affected the outcome of his case. Instead, he has merely announced his position and left it to this Court to discover and rationalize the basis of his claim. This failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Harris, supra* at 50.

Defendant also asserts that defense counsel was ineffective for failing to find and call witnesses that defendant asserts would have been favorable to his case. However, defendant fails to identify any alleged witnesses or the relevance and substance of any testimony they might have offered. In any event, the decision whether to call a witness is presumed to be a matter of trial strategy, which this Court will not second-guess with the benefit of hindsight. *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002).

We affirm but remand for correction of defendant's sentencing information report. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

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these issues are not properly presented to this Court for review. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).